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THE FATE OF WOMEN'S COLLEGES: AN ANTI-SUBORDINATION ANALYSIS

LISA DENISE GLADKE*

Student life at an all-male military academy:

[W]hat VMI taught about how to be a leader—haze, brutalize, and dominate others, yell at and do not listen to others, drive out the different, beat self-esteem out of people, preserve inane and dangerous rituals, resist change and cling to outmoded tradition . . . [W]hat the VMI culture taught boys about being men—The virulent notion of hyper-masculinity implicit in VMI and The Citadel perpetuates a stereotyped notion that “real men” are aggressive, assaultive of and demeaning towards others, can only bond through shared physical adversity and not through emotional empathy or intellectual respect, and should despise the “weak” and feminine within themselves and others.¹

Student life at a women's college:

The absence of such negative elements in women's colleges, and the existence of a supportive environment in which women are taken seriously, may be responsible for the fact that graduates of these schools appear to be more successful in graduate training and jobs than female graduates of coeducational colleges. In a recent survey of women's colleges, the presidents and faculties described their colleges' institutional mission as concerned with equity as well as with traditional liberal arts teaching goals. Their educational goals included providing a supportive atmosphere for women, encouraging women to take leadership roles, developing women's self-confidence and self-respect, and fighting stereotypes.²

* Symposium Editor, BOSTON COLLEGE THIRD WORLD LAW JOURNAL.

¹ Lucinda M. Finley, *Sex-Blind, Separate But Equal, or Anti-Subordination? The Uneasy Legacy of Plessy v. Ferguson for Sex and Gender Discrimination*, 12 GA. ST. U. L. REV. 1089, 1116 (1996).

² Chai R. Feldblum et al., *Legal Challenges to All-Female Organizations*, 21 HARV. C.R.-C.L. L. REV. 171, 179 (1986).

I. INTRODUCTION

These quotes illustrate the dramatic differences between the educational experiences at all-male academies and women's colleges. These experiences have been compared by commentators recently because of the 1996 Supreme Court decision of *United States v. Virginia*.³ The Court decided that the public all-male education offered by the Virginia Military Institute (VMI) was not constitutional.⁴ While the decision did not rule on the fate of all-women colleges, commentators have noted that a ruling against Virginia and VMI could have an adverse effect on all-women colleges, both public and private.⁵ Although this is a legitimate concern, it is more likely that *United States v. Virginia* will be limited to the facts of that case.⁶ Because women's colleges have historically helped their students by eliminating harmful stereotypes, they stand in direct contrast to the all-male academies which discriminated against women. As a result, one could conclude that all-women education (public or private) is necessary and should not be threatened by the *United States v. Virginia* decision.

This note examines the law regarding women's colleges and proposes a different theory to view the issue of women's colleges. First, this note examines the 1996 Supreme Court decision of *United States v. Virginia*. Second, this note considers women's colleges under the current law, and the constitutionality of women's colleges in light of the possible effects of the ruling of *United States v. Virginia*. Finally, the issue of women's colleges is viewed through an anti-subordination lens.

³ 116 S. Ct. 2264 (1996).

⁴ See *id.* at 2269.

⁵ See, e.g., Brief of Mary Baldwin College as Amicus Curiae in Support of Respondents at 2, *United States v. Virginia*, 116 S. Ct. 2264 (1996) (Nos. 94-1941, 94-2107) [hereinafter Brief of Mary Baldwin]; Donald C. Alexander, *How the Supreme Court Could Kill Single-Sex Education*, WASH. TIMES, Nov. 4, 1995, at A17; Daniel Seligman, *As VMI Fares, So May Also the Wellesleys of the World*, RICHMOND TIMES-DISPATCH, Feb. 19, 1996, at A11. Justice Scalia's dissent in *United States v. Virginia* likewise concluded all-female colleges would lose government funding, threatening their existence, as a result of the majority's decision. See 116 S. Ct. at 2306-07; see also Christopher H. Pyle, *Women's Colleges: Is Segregation by Sex Still Justifiable After United States v. Virginia?*, 77 B.U. L. REV. 209, 210 (1997); Jennifer R. Cowan, Note, *Distinguishing Private Women's Colleges from the VMI Decision*, 30 COLUM. J.L. & SOC. PROBS. 137, 161-63 (1997); Jolee Land, Note, *Not Dead Yet: The Future of Single-Sex Education After United States v. Virginia*, 27 STETSON L. REV. 297, 311-12 (1997).

⁶ See, e.g., Cowan, *supra* note 5, at 138; Land, *supra* note 5, at 323.

II. THE VMI CASE

A. Lower Court Decisions and the Supreme Court Opinion

The first of the Virginia Military Institute (VMI) cases was heard in 1991.⁷ The action was prompted by a complaint to the Attorney General from a female high school student who sought admission to VMI and was refused information from the school because she was female.⁸ However, since the student was not a plaintiff in the case, the Justice Department alone initiated the suit against the state of Virginia and VMI.⁹ The district court that first heard the case held that there was a substantial government interest in providing an all-male education at VMI and allowed VMI to continue its all-male policy.¹⁰ The Justice Department appealed this decision.¹¹ The Fourth Circuit Court of Appeals vacated the district court's judgment and gave Virginia three options to remedy the situation: 1) become private, 2) admit women, or 3) create a parallel program for women.¹² The Supreme Court denied certiorari.¹³

Virginia chose to create a parallel program for women and returned to the district court for confirmation that its proposed remedial plan was acceptable.¹⁴ That court found that the all-female institute

⁷ See *United States v. Virginia*, 766 F. Supp. 1407 (W.D. Va. 1991). For a further discussion of the case as it wound its way through the courts in both the liability and remedial phases, see generally, R. Craig Wood & Luke Cornelius, *Public Supported All-Male Military Colleges: The Supreme Court Rules in U.S. v. Commonwealth of Virginia*, 118 ED. LAW REP. 819 (1997); Bennett L. Saferstein, Note, *Revisiting Plessy at the Virginia Military Institute: Reconciling Single-Sex Education with Equal Protection*, 54 U. PITT. L. REV. 637, 654-669 (1993); Jon Allyn Soderberg, *The Virginia Military Institute and the Equal Protection Clause: A Factual and Legal Introduction*, 50 WASH. & LEE L. REV. 15 (1993); David M. Henry, *VMI Faces Another Tough Battle in the Equal Protection War as U.S. Challenges School's Men-Only Policy*, WEST'S LEGAL NEWS, Apr. 16, 1996, available in 1996 WL 259760.

⁸ See *United States v. Virginia*, 766 F. Supp. at 1408.

⁹ See *id.*

¹⁰ See *id.* at 1415; see also Cowan, *supra* note 5, at 149-50.

¹¹ See *United States v. Virginia*, 976 F.2d 890, 891-92 (4th Cir. 1992).

¹² See *id.* at 900. The court also noted that Virginia could provide "other more creative options or combinations." *Id.*

¹³ See generally *United States v. Virginia*, 508 U.S. 946 (1993).

¹⁴ See generally *United States v. Virginia*, 852 F. Supp. 471 (W.D. Va. 1994); Cowan, *supra* note 5, at 150-52. Virginia created an alternative program, called the Virginia Women's Institute of Leadership (VWIL), which was located on the campus of Mary Baldwin College. See Brief of Mary Baldwin, *supra* note 5, at 1. "The program is founded on the belief that women can and do provide significant leadership in the military and other traditionally male-dominated fields, that career opportunity is not restricted by gender, and that single-sex education is for many women better than coeducation in achieving these goals." *Id.* at 2.

satisfied constitutional standards.¹⁵ The Fourth Circuit Court of Appeals affirmed Virginia's plan, finding that the two programs were comparable.¹⁶ A rehearing en banc was later denied by the Fourth Circuit.¹⁷

The Supreme Court decided *United States v. Virginia* on June 26, 1996, over five years after the original district court's decision.¹⁸ The two issues that the Court had to ultimately decide were: 1) did Virginia's exclusion of women from VMI deny those women the equal protection of the laws under the Fourteenth Amendment, and 2) if VMI did violate the Equal Protection requirement, what should be the remedy?¹⁹ Justice Ginsburg, writing for the majority, found that "[n]either the goal of producing citizen-soldiers nor VMI's implementing methodology is inherently unsuitable to women Nevertheless, Virginia has elected to preserve exclusively for men the advantages and opportunities a VMI education affords."²⁰ With this ruling, VMI could no longer continue as a public all-male institution.²¹

The Court applied the standard used in *Mississippi University for Women v. Hogan*²² to determine if gender discrimination existed at VMI.²³ Under this test, Virginia first had to demonstrate an "exceedingly persuasive justification" for excluding women from the citizen-soldier training of VMI.²⁴ To meet this requirement, Virginia argued that single-sex education provided diversity in the state's educational system.²⁵ The Commonwealth also claimed that VMI's program would

There are enough similarities between VWIL and VMI to ensure a similar outcome of successful careers and leadership. *See id.* at 4-7. "In short, the goals of VWIL and VMI are the same, and the methodologies employed to attain those goals have many of the same elements." *Id.* at 7.

The differences are such that the women in VWIL would achieve the goals of the program, and therefore students' needs were considered first and foremost. *See id.* at 5 (Mary Baldwin College (MBC) would not "compromise student welfare" for "litigation objectives"). In designing the program the way it did, MBC felt justified that the Equal Protection Clause did not require an identical program to VMI. *See id.* at 3.

¹⁵ *See United States v. Virginia*, 852 F. Supp. at 484.

¹⁶ *See generally* *United States v. Virginia*, 44 F.3d 1229 (4th Cir. 1995); Cowan, *supra* note 5, at 151-52.

¹⁷ *See generally* *United States v. Virginia*, 52 F.3d 90 (4th Cir. 1995).

¹⁸ *See* *United States v. Virginia*, 116 S. Ct. 2264, 2264 (1996).

¹⁹ *See id.* at 2274; *see also* Cowan, *supra* note 5, at 152-56.

²⁰ *United States v. Virginia*, 116 S. Ct. at 2269.

²¹ *See id.* at 2287.

²² 458 U.S. 718 (1982).

²³ *See* Land, *supra* note 5, at 299-307.

²⁴ *See United States v. Virginia*, 116 S. Ct. at 2274, 2276.

²⁵ *See id.* at 2276.

have to be modified to admit women and that modification would destroy the uniqueness of the school.²⁶ The Court did not find these justifications to be exceedingly persuasive.²⁷

Furthermore, for VMI to survive constitutional scrutiny, Virginia had to show that single-sex education was an important governmental objective and that the discriminatory means were substantially related to the achievement of the objective.²⁸ Virginia did not succeed in meeting this end because the Court found that:

[VMI] offers an educational opportunity no other Virginia institution provides, and the school's "prestige"—associated with its success in developing "citizen-soldiers"—is unequaled. Virginia has closed this facility to its daughters and, instead, has devised for them a "parallel program," with a faculty less impressively credentialed and less well paid, more limited course offerings, fewer opportunities for military training and for scientific specialization Women seeking and fit for a VMI-quality education cannot be offered anything less, under the State's obligation to afford them genuinely equal protection.²⁹

The Court found that Virginia's desire to maintain an all-male educational institution was not a legitimate government objective.³⁰ Overall, VMI perpetuated the stereotypical view that only men should receive military training.³¹ In addition, the all-women military institute created by Virginia was not a constitutional solution because men and women were not treated substantially equal, and in compari-

²⁶ See *id.*

²⁷ See *id.* at 2282.

²⁸ See *id.* at 2271.

²⁹ *United States v. Virginia*, 116 S. Ct. at 2287.

³⁰ See *id.* at 2282.

³¹ See Brief of Twenty-Six Private Women's Colleges [Bennett College (NC), Brenau Women's College (GA), Chatham College (PA), College of the St. Benedict (MN), College of the St. Catherine (MN), College of the St. Elizabeth (NJ), College of the St. Mary (NE), Columbia College (SC), Hartford College for Women (CT), Lesley College (MA), Marymount College—Tarrytown (NY), Midway College (KY), Mount St. Mary's College (CA), Mount Vernon College (D.C.), Notre Dame College of Ohio, Pine Manor College (PA), Russell Sage College (NY), St. Mary's College (IN), St. Mary-of-the-Woods College (IN), Seton Hill College (PA), Spelman College (GA), Trinity College (D.C.), Trinity College of Vermont, Ursuline College (OH), Wilson College (PA)] as Amici Curiae in Support of Petitioner at 8, *United States v. Virginia*, 116 S. Ct. 2264 (1996) (Nos. 94-1941, 94-2107) [hereinafter Brief of Twenty-Six]. Men were favored in receiving military and leadership training because of past discrimination against women in this field. See *id.*

son with VMI, the all-women institute fell short in several areas including "breadth of curricular offerings, endowment, reputation, facilities, strength of alumni networks, and prestige."³²

B. *The Language of the United States v. Virginia Decision and Women's Colleges*

Although the *United States v. Virginia* decision did not explicitly mention other single-sex colleges or programs, certain language in the opinion may be interpreted to support the continued viability of women's colleges.³³ Justice Ginsburg discussed the concepts of citizenship, differences between men and women, the injustices inherent in classifications, and the use of classifications to remedy injustices.³⁴

The Court recognized the fact that women are denied "full citizenship stature—equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities" in our society.³⁵ Equal protection is violated "when a law or official policy denies to women, simply because they are women, full citizenship stature."³⁶ This language is particularly important to supporters of women's colleges because those institutions help women attain full citizenship stature, while not minimizing men's, and therefore cannot be said to violate equal protection.³⁷

The Court also acknowledged that there are differences between men and women, but that these differences should not be used against women, or men.³⁸ The Court noted that the differences between men and women are not reasons to denigrate an individual or put constraints on opportunity.³⁹ Women's colleges recognize these differences, and emphasize the methods by which women learn best.⁴⁰ These methods are used to help women succeed in college, rather than restraining either gender.⁴¹

³² *Id.* at 11; see *United States v. Virginia*, 116 S. Ct. at 2282–87.

³³ See *United States v. Virginia*, 116 S. Ct. at 2276 n.7; see also Cowan, *supra* note 5, at 148, 159; Land, *supra* note 5, at 310–11.

³⁴ See *United States v. Virginia*, 116 S. Ct. at 2275–76, 2282, 2286–87.

³⁵ *Id.* at 2275.

³⁶ *Id.*

³⁷ See *infra* Part III.A.2.b–c (Justifications and Evidentiary Support for Women's Colleges).

³⁸ See *United States v. Virginia*, 116 S. Ct. at 2276.

³⁹ See *id.*

⁴⁰ See *infra* Part III.A.2.b–c (Justifications and Evidentiary Support for Women's Colleges).

⁴¹ See *infra* Part III.A.2.b–c (Justifications and Evidentiary Support for Women's Colleges).

The Court recognized that sex classifications can create injustices⁴² and that such classifications cannot be used "to create or perpetuate the legal, social, and economic inferiority of women."⁴³ Although sex classifications may have an adverse effect on women when used in the context of all-male institutions, women's colleges do not produce the same effect; indeed they have the opposite effect by helping women achieve legal, social, and economic equality.⁴⁴

Most importantly, the Court noted that sex classifications may be legitimate when they are used to create equalities between the sexes and remedy past injustices against women.⁴⁵ "Sex classifications may be used to compensate women 'for particular economic disabilities [they have] suffered,' . . . to 'promote equal employment opportunity,' . . . [and] to advance full development of the talent and capacities of our Nation's people."⁴⁶ The gender classifications of women's colleges help women achieve economic and career success by teaching women how to reach leadership positions.⁴⁷

Women's colleges are drastically different in the areas that made VMI's single-gender education unconstitutional.⁴⁸ First, VMI's gender classification helped to perpetuate past injustices.⁴⁹ Women were categorically excluded from the educational opportunities at VMI, and this exclusion could only be remedied by the elimination of the past and future discrimination at VMI.⁵⁰ Women's colleges, on the other hand, help remedy past injustices against women.⁵¹

Second, women were excluded from opportunities by being excluded from VMI. Qualified women could not take part in the training that VMI offered.⁵² The new all-women leadership institute in Virginia did not remedy the equal protection violation, since women who met admissions requirements and wanted a VMI education were barred from receiving such an education and were expected to attend an

⁴² See *United States v. Virginia*, 116 S. Ct. at 2276.

⁴³ *Id.*

⁴⁴ See *infra* Part III.A.2.b-c (Justifications and Evidentiary Support for Women's Colleges).

⁴⁵ See *United States v. Virginia*, 116 S. Ct. at 2276.

⁴⁶ *Id.* (citations omitted).

⁴⁷ See *infra* Part III.A.2.b-c (Justifications and Evidentiary Support for Women's Colleges).

⁴⁸ See *United States v. Virginia*, 116 S. Ct. at 2282, 2286-87.

⁴⁹ See *id.* at 2282.

⁵⁰ See *id.*

⁵¹ See *infra* Part III.A.2.b-c (Justifications and Evidentiary Support for Women's Colleges).

⁵² See *United States v. Virginia*, 116 S. Ct. at 2286-87.

inferior educational institution.⁵³ In contrast, women's colleges afford women new leadership opportunities.⁵⁴

III. THE ALL-WOMEN COLLEGE ISSUE UNDER THE CURRENT LAW

A. *Why Women's Colleges are Necessary and Pass Constitutional Muster*

1. Unlike VMI, Women's Colleges are not State Actors and are Protected by Congressional Intent

a. *Most Women's Colleges are Private*

VMI's violation of the Equal Protection Clause of the Fourteenth Amendment is found in the fact that VMI is a public school, supported by state funds, and it decreased educational opportunities for women by excluding them.⁵⁵ Unlike the publicly supported VMI, most women's colleges are private.⁵⁶ This difference is the most obvious

⁵³ See *id.* at 2286. Even though the remedial program was not a legitimate substitute for a VMI education, on its own merits, it could serve as an educational opportunity for women that the Court might deem legitimate because it offers women more leadership opportunities. See, e.g., Brief of Mary Baldwin, *supra* note 5, at 3–20.

The all-women's military programs that were created as a remedy to VMI's constitutional violations could be salvaged. There were many benefits of the VWIL. It was "an extraordinary educational opportunity for women." Brief of Amici Curiae in Support of Respondents by Dr. Kenneth E. Clark et al. at 3, *United States v. Virginia*, 116 S. Ct. 2264 (1996) (Nos. 94–1941, 94–2107) [hereinafter Brief of Clark]. The VWIL was created by people who wished "the advancement of women in every aspect of society," thus rejecting any stereotypes regarding the abilities and roles of women. See *id.* at 2, 4.

The mission and goals of VWIL replicated those of the VMI program. See *id.* at 4. The creators did not see gender as limiting one's role in society, and the VWIL prepares women to be leaders in every field. See *id.* at 4, 9. The program was created to give women a unique and valuable opportunity rather than superficial equality. See *id.* at 4.

Mary Baldwin College (MBC) was one of the schools which designed a women's program. School authorities described the founding principles of VWIL:

First, MBC believes that single-sex education conveys unique educational benefits and should be available to both women and men. Second, MBC is convinced that a wide array of educational options is crucial to the future strength of this Nation and should be publicly available. Third, VWIL presents an extraordinary opportunity; it is a forward-looking program which serves a real need for the young women of today.

Brief of Mary Baldwin, *supra* note 5, at 1.

⁵⁴ See *infra* Part III.A.2.b–c (Justifications and Evidentiary Support for Women's Colleges).

⁵⁵ See *United States v. Virginia*, 116 S. Ct. at 2269–79, 2282. The Fourteenth Amendment states "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

⁵⁶ There are eighty-four private women's colleges, two public women's colleges and three

reason why women's colleges are not unconstitutional under *United States v. Virginia*.⁵⁷

Some amicus briefs to the Supreme Court in the VMI case espoused the view that the existence of private all-women colleges would be threatened if VMI were to lose the case.⁵⁸ They contend that it would

private men's colleges. See Mike Allen, *Separatism Is In, Except for White Men*, N.Y. TIMES, June 30, 1996, § 4, at 5; Barry Shlachter, *Women's University Thrives While Bucking Trend*, HOUS. CHRON., Oct. 31, 1993, at 5. The two public all-women colleges are Texas Woman's University and Rutgers University Douglass College. See Shlachter, *supra*, at 5. "Texas Woman's University survives, even thrives, as a predominantly women's school that allows men into only a few specialized programs." *Id.* The school survived even though the legislature contemplated merging it with another school, because of its clearly defined mission. See *id.* Its undergraduate department is closed to men, because men could get a similar liberal arts education at a nearby public school. See *id.* Douglass College is the women's college at Rutgers. See James Ahearn, *After VMI Ruling, Is Douglass Safe?*, RECORD (New Jersey), Oct. 13, 1996, at 2. Douglass has denied admission to men since 1918, when it was founded as the New Jersey College for Women. See *id.* The college sets its own admissions standards and conducts its own graduation ceremonies. See *id.* Douglass students take Rutgers courses, which are open to all students. See *id.* The professors are Rutgers professors. See *id.* Douglass may be safe for those reasons, as well as because of the fact that Douglass is not a legal entity. See *id.* It is "essentially part of a co-educational university enterprise." *Id.* The three private all-male colleges are Hampden-Sydney College in Virginia, Wabash College in Indiana, and Morehouse College in Georgia [along with Hobart College in New York, which is coordinate with an all-women college, William Smith]. See Spencer S. Hsu, *Male-Only Still The Only Way for Hampden-Sydney College*, WASH. POST, Aug. 21, 1996, at C1; see also Pyle, *supra* note 5, at 235; Cowan, *supra* note 5, at 140; *Lawyers Wrong, Private Schools Say*, RICHMOND TIMES-DISPATCH, June 25, 1991, at B1.

⁵⁷ The organization engaging in the discriminatory practice must be a state actor. See Feldblum et al., *supra* note 2, at 193; Land, *supra* note 5, at 312-13, 323. Other challenges can be made under state law, for further discussion, see Feldblum, *supra* note 2, at 181-93 (state public accommodation statutes), and 199-202 (states' equal rights amendments).

The case of *Williams v. McNair*, 316 F. Supp. 134 (D.S.C. 1970), discussed the issue of public all-women colleges and found them constitutional. Male plaintiffs sued to gain entrance into Winthrop College in South Carolina. See *id.* at 135. The court upheld the single-gender character of the school. See *id.* at 139. The college was "designed as a school for young ladies" offering "courses thought to be specially helpful to female students." *Id.* at 136. The case was decided on a rational basis test (which has since been changed to intermediate scrutiny as a result of *Hogan* and *United States v. Virginia*). See *id.* at 137; see also *infra* Part III.A.2.a. (for the Supreme Court's intermediate scrutiny construction for gender discrimination cases). The school was all-female because of the "better educational advantages." *Williams*, 316 F. Supp. at 137.

Male students in South Carolina had a range of other schools from which to choose. See *id.* "There is no suggestion that there is any special feature connected with Winthrop that will make it more advantageous educationally to them than any number of other State-supported institutions." *Id.* at 138. There were no courses in particular that the plaintiffs wished to take. See *id.* "It is not intimated that Winthrop offers a wider range of subject matter or enjoys a position of outstanding prestige over the other State-supported institutions in this State whose admission policies are coeducational." *Id.* at 138-39. The male plaintiffs had no reason to change the single-sex character of Winthrop College. [Winthrop College, now Winthrop University, became coeducational in 1974. EDWARD T. CUSTARD, *THE BIG BOOK OF COLLEGES* 1174 (1996).].

⁵⁸ See Brief of Mary Baldwin, *supra* note 5, at 2. This assumption was supported by Justice Scalia in his dissent. See *United States v. Virginia*, 116 S. Ct. at 2264, 2306-07. "The potential of

be more difficult to justify an educational program, public or private, that only allows women.⁵⁹ Other amicus briefs spelled out the reasons why private women's colleges would not be affected by the Court's ruling in VMI: "VMI is a public institution; it has an admissions policy that limits enrollment to men; and it has a mission that perpetuates the traditional stereotype of men as soldiers."⁶⁰ Women's colleges are different from VMI since their mission is to increase women's educational opportunities.⁶¹

b. *What the Public/Private Distinction Means for Women's Colleges*

Although the Equal Protection Clause applies only to state actors (public schools), some have contended that the public/private distinction may not be enough to shield women's colleges because private schools and their students receive both federal and state funding.⁶² Women's colleges receive about twenty percent of their operating costs from the government, and their students receive government loans.⁶³ If these government benefits were characterized by a court as public funding, that court could also find that state action exists, and withhold this money from women's colleges because their admissions policies discriminate against men.⁶⁴ The VMI ruling could mean that govern-

today's decision for widespread disruption of existing institutions lies in its application to *private* single-sex education." *Id.* at 2306.

⁵⁹ See Brief of Mary Baldwin, *supra* note 5, at 20. Educators experimenting with single-sex programs also saw a potentially expansive impact of the Court's ruling in this case—they were concerned that a decision against VMI would jeopardize all the single-sex public schools in the country beyond higher education and could possibly endanger single-sex private schools. See Brief of Women's Schools Together, Inc. et al. at 27, *United States v. Virginia*, 116 S. Ct. 2264 (1996) (Nos. 94-1941, 94-2107) [hereinafter Brief of Women's Schools].

⁶⁰ Brief of Twenty-Six, *supra* note 31, at 4.

⁶¹ See *id.* at 2.

⁶² See Pyle, *supra* note 5, at 210, 214, 221; Cowan, *supra* note 5, at 161-64. "When the Court reaches a Brown-type conclusion for gender segregation cases, all public women's colleges have to integrate, and all private women's colleges will begin to lose their grip on direct government subsidies." Pyle, *supra* note 5, at 215.

⁶³ See Karla Cooper-Boggs, Note, *The Link Between Private and Public Single-Sex Colleges: Will Wellesley Stand or Fall with The Citadel?*, 29 IND. L. REV. 131, 137 (1995). "Nationwide, private colleges receive an average 18 percent of their funds from federal and state governments." *Women's Colleges Next?*, RICHMOND-TIMES DISPATCH, July 2, 1996, at A6. Private colleges also have preferential treatment from tax-exempt status. See *id.* This tax-exempt status is seen as crucial to higher education. See *id.* They also receive help through student grants and loans that pay tuition. See *id.* Nearly 75% comes from the federal government. See *id.* At Wellesley College, federal and state funding for undergraduates totaled \$5.6 million in 1990-91. See *id.* At Mount Holyoke College, "federal funds account for 3.8 percent of the budget" and at Spelman College, "they account for 14.2 percent." *Id.*; see also Pyle, *supra* note 5, at 212.

⁶⁴ See Cooper-Boggs, *supra* note 63, at 140; Cowan, *supra* note 5, at 163-68.

mental financial support would no longer be available to women's schools or that their tax-exempt status could be withdrawn.⁶⁵ Their tax-exempt status could be affected if a court were to determine that women's colleges violate public policy by denying men educational opportunities.⁶⁶ Private colleges would not be able to survive without government grants, tax-exempt status, and student loans.⁶⁷ If a court found a link between the states and the colleges strong enough to support a finding of state action, women's colleges could be defined as public institutions subject to the same reasoning that forced VMI to become coeducational.⁶⁸

i. Women's Colleges Are Not State Actors

A finding of state action usually requires state involvement in the school's policies or the institution's performance of traditional government functions.⁶⁹ As such, courts have been unwilling to find state action in cases involving the actions of private colleges and universities merely based on factors such as educational services, regulation by the

⁶⁵ See Brief of Mary Baldwin, *supra* note 5, at 23, 25–28; see also Pyle, *supra* note 5, at 215, 219; Cowan, *supra* note 5, at 138. For a further discussion on tax-exempt status, see Cooper-Boggs, *supra* note 63, at 147–49. Cooper-Boggs explained:

Currently, the very significant financial benefit of tax exempt status is granted to private women's colleges. Under the Internal Revenue Code (IRC) Section 501(c)(3), private colleges are exempt from paying income taxes because they are considered "corporations . . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes." Also, under IRC Section 170, financial contributions made to private women's colleges are deductible as "charitable contributions." This provision gives private women's colleges an additional financial benefit because it encourages taxpayers to contribute to the colleges in order to receive a tax deduction In summary, both the judiciary and the IRS have the power to deny tax exempt status to private women's colleges. Such a denial would severely affect a college's finances, and would likely lead to the demise or coeducation of many private women's colleges.

Id. at 147, 149.

⁶⁶ See Pyle, *supra* note 5, at 215–16; Cooper-Boggs, *supra* note 63, at 148.

⁶⁷ See Pyle, *supra* note 5, at 212; Cooper-Boggs, *supra* note 63, at 140.

⁶⁸ See Cooper-Boggs, *supra* note 63, at 143; Cowan, *supra* note 5, at 164–68. For a discussion on indirect government support, see Cowan, *supra* note 5, at 168–73.

⁶⁹ See Brief of Twenty-Six, *supra* note 31, at 20; see also MARK G. YODOF ET AL., EDUCATIONAL POLICY AND THE LAW 144 (3d ed. 1992); Cowan, *supra* note 5, at 164, 166. One commentator has noted:

The mere fact that a private school may be regulated by the state or that it receives governmental financial support or that it uses the name of the state in the name of the school has not been deemed sufficient involvement to conclude that the school's actions were really government action.

YODOF ET AL., *supra*, at 144.

State, tax-exempt status, or the receipt of state services or funding.⁷⁰ Women's colleges should not be considered state actors.⁷¹

A Wisconsin court considered the issue of private women's colleges and state action. It concluded that state action, including financial support to the college, did not result in state involvement in the college's admission policy or constitute the state's de facto control of the college.⁷²

The Supreme Court has not yet developed a specific test to determine state action.⁷³

There are however, several factors which the Court considers, including whether the private organization is engaged in a public function, whether the state has encouraged private activities, whether the government regulates the private entity, whether there is a symbiotic relationship between the government and private entity, and whether the state provides funds to the private entity.⁷⁴

Various courts' application of the criteria has established a high threshold for defining a state actor.⁷⁵ Thus, most private actors, even if they maintain extensive ties with the government, are not subject to direct constitutional attack.⁷⁶ For a successful constitutional attack, the state needs to exercise coercive power or give significant encouragement such that any decision made by the actor would be considered a state decision.⁷⁷ As a result, most private organizations are not likely to be designated state actors.⁷⁸ Women's colleges do not meet most of the factors previously discussed—there is limited or no government regulation, there is no symbiotic relationship between the government and

⁷⁰ See Brief of Twenty-Six, *supra* note 31, at 20.

⁷¹ See Feldblum et al., *supra* note 2, at 193; Cowan, *supra* note 5, at 166–68. While the Supreme Court has not developed a definitive test, the factors that it considers in state action cases are not present in the issue of private women's colleges. See Cooper-Boggs, *supra* note 63, at 143. *But see* Cowan, *supra* note 5, at 164, 168 (discussing three general situations).

⁷² See *Naranjo v. Alverno College*, 487 F. Supp. 635, 637 (E.D. Wis. 1980). It must be noted that this case was decided two years before *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982). See Cowan, *supra* note 5, at 167. For other cases involving private schools, see *id.* at 166–68.

⁷³ See Cowan, *supra* note 5, at 164–66 (for discussion of situations where private actions are equated with state action).

⁷⁴ Cooper-Boggs, *supra* note 63, at 143.

⁷⁵ See Feldblum et al., *supra* note 2, at 194.

⁷⁶ See *id.*

⁷⁷ See *id.* at 195; see also Cowan, *supra* note 5, at 164, 166.

⁷⁸ See Feldblum et al., *supra* note 2, at 199; Cowan, *supra* note 5, at 166.

private women's colleges, and the government funding does not meet the high threshold set by the courts to be a state actor.

ii. Tax-Exempt Status and Congressional Intent

Women's colleges should not find their tax-exempt status threatened because they do not violate public policy.⁷⁹ Furthermore, when Congress enacted Title IX, it created an exemption for single-sex colleges.⁸⁰

Single-sex colleges would not lose their tax-exempt status as a result of *United States v. Virginia* because they do not violate the public policy requirement for tax-exempt status.⁸¹ They are "in harmony with the public interest" because they allow women, who have been discriminated against in the past as a group, more opportunities.⁸² Women's colleges can establish that they further an important public policy interest because they exist to create equality in society.⁸³

Through Title IX of the Education Amendments of 1972,⁸⁴ which preserved single-gender undergraduate schools, Congress legitimated

⁷⁹ See Brief of Twenty-Six, *supra* note 31, at 23 (discussing *Bob Jones University v. United States*, 461 U.S. 574, 592, 598 (1983)). But see Pyle, *supra* note 5, at 215-16 (arguing that tax exemption to women's colleges may be against public policy). Justice Scalia concluded in his dissent that "it is certainly not beyond the Court that rendered today's decision to hold that a donation to a single-sex college should be deemed contrary to public policy and therefore not deductible if the college discriminates on the basis of sex." *United States v. Virginia*, 116 S. Ct. 2264, 2306-07 (1996).

⁸⁰ See Pyle, *supra* note 5, at 211.

⁸¹ See Brief of Twenty-Six, *supra* note 31, at 23 (discussing *Bob Jones University*, 461 U.S. at 592, 598).

⁸² Feldblum et al., *supra* note 2, at 203. The exemption will only be vulnerable if a government official decides to revoke it, which has not been done yet with a women's college. See *id.* at 204. In *Trustees of Smith College v. Board of Assessors*, the local tax assessors attempted to tax a parcel of Smith College's land under the theory that, as an all-female college, Smith is precluded from receiving tax exemption. See 434 N.E.2d 182, 183 (Mass. 1982). The court ruled that the tax-exempt status had to be challenged by the Attorney General or the Commissioner. See *id.* at 184; see also Cooper-Boggs, *supra* note 63, at 147:

In 1982, the tax exempt status of Smith College was challenged on the theory that because its admission policy was discriminatory, it should not be considered a "charitable institution." In that case, the court strictly applied the language of the IRC, finding that because Smith was an "educational institution," it was exempt from paying taxes.

Cooper-Boggs, *supra* note 63, at 147.

⁸³ See Feldblum et al., *supra* note 2, at 224.

⁸⁴ Title IX of the Education Amendments of 1972, 20 U.S.C.A. § 1681(a) (West 1990) states: No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that

women's colleges.⁸⁵ In the case of *Naranjo v. Alverno College*, the Wisconsin court found that the express language of Title IX did not apply to admissions policies of private undergraduate institutions.⁸⁶ It seems that Congress has preserved the role of all-women colleges in furthering equality of economic and career opportunities for women. By this analysis, the invalidation of VMI's all-male status does not affect the viability of private women's colleges.⁸⁷ Furthermore, undermining women's colleges by thwarting their admissions policies and goals is "a dubious use of legal resources."⁸⁸

2. All-Women Education Provides Educational Benefits—An Exceedingly Persuasive Justification for Excluding Men from Women's Colleges

Even if the federal courts were to expand the scope of the state action concept, the courts should still uphold the right of women's colleges to stay single-sex under current law.⁸⁹ An important concern is the purpose of the women's colleges, which "operate to dissipate, rather than perpetuate, traditional gender classifications."⁹⁰

... in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education . . . [and] in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex

Id.

⁸⁵ See Brief of Twenty-Six, *supra* note 31, at 24; Cowan, *supra* note 5, at 171; Land, *supra* note 5, at 321-22.

⁸⁶ See *Naranjo v. Alverno College*, 487 F. Supp. 635, 637 (E.D. Wis. 1980).

⁸⁷ See Brief of Twenty-Six, *supra* note 31, at 26. For a further discussion of other Congressional options, such as the Commerce Clause, see Cooper-Boggs, *supra* note 63, at 149-51, which concludes:

These cases show that Congress certainly has the power, through the Commerce Clause, to regulate the admissions policies of women's colleges, and that the Court would likely approve this regulation. As the McClung Court noted, "the power of Congress in this field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere."

Id. at 151.

⁸⁸ Deborah L. Rhode, *Association and Assimilation*, 81 Nw. U. L. Rev. 106, 144 (1986).

⁸⁹ See Feldblum et al., *supra* note 2, at 193. "[C]reative litigation strategies in choosing the party to be sued may expand the number of cases in which state action would be found in the interaction between government and private organizations." *Id.* at 199. But see Pyle, *supra* note 5, at 260-63 (rejecting both the special environment and affirmative action defenses).

⁹⁰ Brief of Twenty-Six, *supra* note 31, at 5.

a. *Courts' Current Construction for Gender Discrimination Cases*

Women's colleges stand in stark contrast to VMI, and would survive constitutional scrutiny.⁹¹ Under the precedents of *Mississippi University for Women v. Hogan* and *United States v. Virginia*, the test to determine whether all-women colleges can maintain policies that exclude men would be the "exceedingly persuasive justification" test.⁹²

The *United States v. Virginia* opinion explains the Court's current direction for cases regarding gender-based classifications. Under the Court's holding, courts are to examine the "differential treatment or denial of opportunity for which relief is sought" to determine if there is an equal protection violation.⁹³ The burden rests on the state to show that the classification serves important government objectives and the means employed are substantially related to the objective.⁹⁴

Several criteria can be inferred from *Mississippi University for Women v. Hogan*.⁹⁵ The gender negatively affected "must have suffered a disadvantage related to the classification."⁹⁶ The policy must have been adopted with the intention of overcoming disadvantages⁹⁷ and cannot perpetuate stereotypes about the disadvantaged group.⁹⁸ In addition, the policy must also in fact help the gender negatively affected to overcome disadvantages.⁹⁹

b. *Justifications for Women's Colleges*

Because women's colleges treat men and women differently by excluding men, they would have to articulate an "exceedingly persuasive

⁹¹ See generally Cowan, *supra* note 5, at 161-83; Land, *supra* note 5, 312-23. For more discussion of the scrutiny standard that the Court may use in future single-sex education cases, see Pyle, *supra* note 5, at 219-33, concluding that "Justice Ginsburg's opinion came as close to strict scrutiny as possible without actually embracing it." *Id.* at 233; see also Cowan, *supra* note 5, at 143-47, 152-56, 173-77; Land, *supra* note 5, at 299-306, 317-21.

⁹² See *United States v. Virginia*, 116 S. Ct. 2264, 2275 (1996); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); see also Pyle, *supra* note 5, at 230; Land, *supra* note 5, at 302-07. Commentators have noted that single-sex schools may face "skeptical scrutiny" in the future. See Pyle, *supra* note 5, at 230-33. For the development of the intermediate scrutiny standard, see Cowan, *supra* note 5, at 143-47.

⁹³ See *United States v. Virginia*, 116 S. Ct. at 2275.

⁹⁴ See *id.*

⁹⁵ See Pyle, *supra* note 5, at 260-69; Cowan, *supra* note 5, at 145-47; Land, *supra* note 5, at 302-06.

⁹⁶ Feldblum et al., *supra* note 2, at 210, 219.

⁹⁷ See *id.*

⁹⁸ See *id.* at 211, 219; see also Pyle, *supra* note 5, at 264-65.

⁹⁹ See Feldblum et al., *supra* note 2, at 211, 219.

justification" to remain constitutionally viable.¹⁰⁰ Generally, justification can take two forms.¹⁰¹ The first is a remedial rationale.¹⁰² Under this justification, the short-term objective of women's colleges is to overcome women's historical disadvantages.¹⁰³ The true purpose must be the objective of compensating women for past discrimination,¹⁰⁴ such that full educational development in women is fostered.¹⁰⁵ The second form of justification is pluralism.¹⁰⁶ Under this justification, women's colleges must show that "single-sex education promotes values of cultural diversity and personal association."¹⁰⁷ The rationale is that diversity of school settings better serves students' needs.¹⁰⁸

The compensatory purpose doctrine, as applied to women's colleges, is appropriate when the disadvantages women suffer are not the result of a rule or policy that can be removed, invalidated, or remedied by statute.¹⁰⁹ Such disadvantages must be a result of "long-standing and deeply embedded notions regarding the proper roles of men and women."¹¹⁰ The compensatory purpose doctrine also ensures that women have the opportunity to achieve equality with men by combating the disadvantages they face.¹¹¹ Under this doctrine, a school would have to show that the compelling government interest in excluding males "compensates women for the continuing effects of historical discrimination."¹¹² The Court in *United States v. Virginia* held that there must be a genuine justification, not a hypothetical or post hoc justification, "[a]nd it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."¹¹³

¹⁰⁰ See *United States v. Virginia*, 116 S. Ct. 2264, 2275 (1996); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

¹⁰¹ See Pyle, *supra* note 5, at 235-36; Rhode, *supra* note 88, at 140.

¹⁰² See Rhode, *supra* note 88, at 140; Land, *supra* note 5, at 317. One commentator called this "the affirmative action justification." Pyle, *supra* note 5, at 235. However, commentators have rejected this justification. See Pyle, *supra* note 5, at 261-63; Cowan, *supra* note 5, at 142, 177-81.

¹⁰³ See Rhode, *supra* note 93, at 140; Cowan, *supra* note 5, at 142, 177.

¹⁰⁴ See Feldblum et al., *supra* note 2, at 198, 205.

¹⁰⁵ See Kingsley R. Browne, *Biology, Equality, and the Law: The Legal Significance of Biological Sex Differences*, 38 Sw. L.J. 617, 682 (1984).

¹⁰⁶ See Rhode, *supra* note 88, at 140.

¹⁰⁷ *Id.* One commentator has called this "the special needs, special environment justification." Pyle, *supra* note 5, at 236. Some commentators have rejected this justification. See *id.* at 260-61.

¹⁰⁸ See Browne, *supra* note 105, at 682.

¹⁰⁹ See Feldblum et al., *supra* note 2, at 214.

¹¹⁰ *Id.*

¹¹¹ See *id.* at 214-15.

¹¹² Sara L. Mandelbaum, "As *VMI Goes . . .*": *The Domino Effect and Other Stubborn Myths*, 6 SETON HALL CONST. L.J. 979, 982 (1996).

¹¹³ *United States v. Virginia*, 116 S. Ct. 2264, 2275 (1996).

Some consider the remedial theory, under which women's colleges serve to remedy past discrimination, to be a weak argument,¹¹⁴ especially in the area of higher education.¹¹⁵ Opponents of the remedial theory contend that discrimination against women has not seemingly affected access to a college education.¹¹⁶ Access to the educational system seems to be completely unobstructed for women.¹¹⁷ The majority of American college students are women, about fifty-four percent, and women generally receive higher grades than men.¹¹⁸ As one commentator put it, "The coeds have become the eds."¹¹⁹

However, such contentions distort the issue. Discrimination against women, which is the focus of the remedial action, is not only about possible discrimination that occurs in colleges, it is also about the remedial action that is applied to thwart the discrimination felt afterwards.¹²⁰ Women's colleges prepare women for success in society and their remedial purpose lies therein.¹²¹

¹¹⁴ See Brief of Mary Baldwin, *supra* note 5, at 20.

¹¹⁵ See Pyle, *supra* note 5, at 235-63 (challenging the remedial theory as applied to women's colleges); Cowan, *supra* note 5, at 178-81 (considering the Court's recent decisions in race based affirmative action). Some commentators have challenged the data used to support the remedial theory for women's colleges. See Pyle, *supra* note 5, at 237. "The data favoring separate schools and colleges for women seems copious, particularly when compared to the data on the benefits of all-male institutions." *Id.* Some commentators have challenged the notion that women's colleges remedy past discrimination. See Cowan, *supra* note 5, at 179-80. One commentator stated that:

Thus to pass constitutional muster, a remedial program must be narrowly tailored to remedy past discrimination against specific individuals. Clearly, this would be a difficult test for private women's colleges to meet, since many of their students have not previously been rejected by co-educational schools and women constitute more than fifty percent of college students.

Id. Commentators have noted the weaknesses in relying on the remedial theory in light of recent Supreme Court decisions striking down race-based affirmative action. *Id.* at 180. "If strict scrutiny were instituted for sex-based classifications, the Court similarly could rule unconstitutional statutory exemptions that allow private women's colleges to receive federal funding in spite of the fact that their admissions policies discriminate on the basis of sex." *Id.*

¹¹⁶ See Brief of Mary Baldwin, *supra* note 5, at 21; see also Pyle, *supra* note 5, at 240-41 ("more girls than boys go on to higher education"); Cowan, *supra* note 5, at 179-80 (women's college students were not rejected by coeducational schools).

¹¹⁷ See Brief of Mary Baldwin, *supra* note 5, at 22; see also Pyle, *supra* note 5, at 240; Cowan, *supra* note 5, at 179-80.

¹¹⁸ See Pyle, *supra* note 5, at 240-41; Cooper-Boggs, *supra* note 63, at 146; Cowan, *supra* note 5, at 179-80; Peter Schrag, *The Mills and Wellesley Questions*, SACRAMENTO BEE, May 30, 1990, at B6.

¹¹⁹ Schrag, *supra* note 118, at B6.

¹²⁰ See, e.g., Feldblum et al., *supra* note 2, at 180-81; Mandelbaum, *supra* note 112, at 982-83. But see Pyle, *supra* note 5, at 235, 262. (concluding that "[t]here is no proof that excluding men from women's colleges makes equality of opportunity for women more likely after graduation.").

¹²¹ See, e.g., Feldblum et al., *supra* note 2, at 180-81; Mandelbaum, *supra* note 112, at 982-83.

Women are underrepresented in leadership positions.¹²² They are over-represented on the lower end of the pay scale.¹²³ Society as a whole is not responsive to problems "that pervasively and disproportionately affect women, such as sexual assault, battering, sexual objectification, workplaces inhospitable to pregnancy and childrearing, and attacks on abortion providers, clinics, and patients"¹²⁴ Also, activities assigned to women are devalued in comparison to the activities assigned men, and women themselves are likewise devalued in comparison to men.¹²⁵

c. *Evidentiary Support for Women's Colleges*

If the policies of a women's college policies were challenged, that school could first show that by excluding men, the school provides a leadership program for women.¹²⁶ The school could show through

But see Cynthia Fuchs Epstein, *The Myths and Justifications of Sex Segregation in Higher Education: VMI and The Citadel*, 4 DUKE J. GENDER L. & POL'Y 101, 118; Pyle, *supra* note 5, at 235.

¹²² See CATHARINE A. MACKINNON, *Not by Law Alone: From a Debate with Phyllis Schlafly*, in FEMINISM UNMODIFIED 21, 31 (1987) [hereinafter FEMINISM UNMODIFIED] (noting women's "comparative lack of presence in tenured faculties, Congress, the courts, executive boardrooms, university presidencies, editorships of newspapers and publishing houses").

¹²³ See *id.* at 24-25 (noting that "[m]ost women work . . . in the female job ghetto, in high-heeled, low-status jobs with low pay," that women bring "home fifty-three to fifty-nine cents to the average male dollar," and that "[e]ven adjusted for education and years worked, women make less").

¹²⁴ Finley, *supra* note 1, at 1125; see also Tracy Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657, 1674 (1997); see, e.g., MACKINNON, *Not by Law Alone: From a Debate with Phyllis Schlafly*, *supra* note 122, at 21-31 (statistics); CATHARINE A. MACKINNON, *Desire and Power*, in FEMINISM UNMODIFIED, *supra* note 122, at 46, 51-52 (statistics); CATHARINE A. MACKINNON, *A Rally against Rape*, in FEMINISM UNMODIFIED, *supra* note 122, at 81, 81-84 (rape); CATHARINE A. MACKINNON, *Sex and Violence: A Perspective*, in FEMINISM UNMODIFIED, *supra* note 122, at 85, 85-92 (violence against women); CATHARINE A. MACKINNON, *Sexual Harassment: Its First Decade in Court*, in FEMINISM UNMODIFIED, *supra* note 122, at 103, 103-16 (sexual harassment); CATHARINE A. MACKINNON, *Not a Moral Issue*, in FEMINISM UNMODIFIED, *supra* note 122, at 146, 146-62 (pornography). As MacKinnon comments:

How do you know when a group is on the bottom? It may be some indication when they can be assaulted, and authorities ignore them; physically abused, and people turn away or find it entertaining; economically deprived, and it is seen as all they are worth; made the object of jokes, and few ask what makes the jokes funny; imaged as animallike, confined to a narrow range of tasks and functions, and told it is all harmless or inevitable and even for their benefit as well as the best they can expect, given what they are. These are all true for women.

MACKINNON, *Not by Law Alone: From a Debate with Phyllis Schlafly*, *supra* note 122, at 30.

¹²⁵ See *Speeches: Single Gender Education and the Constitution*, 40 LOY. L. REV. 253, 254 (1994) [hereinafter *Speeches*]. The panel discussion was held at the annual American Bar Association Convention in 1994. *Id.* at 253 n.*. Dr. Beth Willinger, Anne Marie Whittemore, Sara L. Mandelbaum, and John Borkowski served on the panel. *Id.*

¹²⁶ See Cooper-Boggs, *supra* note 63, at 145.

studies that women's college graduates have elevated levels of career achievement and that there is considerable discrimination against females in coeducational education.¹²⁷ This would bolster the school's argument that it serves a compensatory purpose "to redress the effects of historical discrimination or disadvantage," thus providing a governmental purpose.¹²⁸

The justification for excluding men from admission to women's colleges is that women are not always adequately educated in a coeducational environment, suffer disadvantages when they enter the work force, and are vastly under-represented in leadership positions in society, and that education in women's colleges can offset these trends.¹²⁹ The state objective is to make the leadership in society more representative and make society more aware of women's issues.¹³⁰ The means for achieving these goals is to educate women in an environment that enables them to realize their potential and enables them to fulfill leadership roles in society.¹³¹

There is ample evidentiary support for preserving women's colleges. As a historical matter, such schools began under a policy of sexual separation, but evolved into offering a standard academic curriculum.¹³² While to the outside world the schools reinforced traditional roles for women, they also challenged those roles in the classroom.¹³³ These schools opened doors for women by giving women an education comparable to men's education.¹³⁴ The leading women's colleges also stressed individual achievement.¹³⁵ With the women's rights movement of the 1960s and 1970s, women's colleges reexamined their

¹²⁷ See *id.*

¹²⁸ *Id.* (quoting Stuart Taylor, Jr., *Standing Up For Single-Sex Education*, RECORDER, Oct. 13, 1994, at 8).

¹²⁹ See Pyle, *supra* note 5, at 235; Cowan, *supra* note 5, at 141. But see Epstein, *supra* note 121, at 118 (disagreeing that women's colleges are the answer). See generally MACKINNON, *Not by Law Alone: From a Debate with Phyllis Schlafly*, *supra* note 122, at 21-31 (for examples of women's disadvantages in workforce and women's under-representation in leadership positions).

¹³⁰ See generally MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 122 (for ways in which society ignores problems that largely affect only women, and ways that the structure of law and society needs to change).

¹³¹ See *infra* Part III.A.2.c (Evidentiary Support for Women's Colleges) (for ways in which women's colleges educate their students and prepare them for leadership).

¹³² See Rhode, *supra* note 88, at 128-29. For a more complete discussion of women's college education in the United States, see Pyle, *supra* note 5, at 246-47; Cowan, *supra* note 5, at 139-42.

¹³³ See, e.g., Rhode, *supra* note 88, at 131-32.

¹³⁴ See *Speeches*, *supra* note 125, at 260.

¹³⁵ See Rhode, *supra* note 88, at 134.

missions.¹³⁶ They began preparing women for expanding opportunities, especially career training and leadership.¹³⁷

The "remaining women's colleges are experiencing a substantial increase in applications and enrollment during the 1990's. Many attribute this sudden popularity to the growing opinion that women are 'shortchanged' in coeducational settings, the statistical success of women's college graduates . . . [and the success of] famous women's college graduates."¹³⁸ The colleges are sending out a message of female empowerment.¹³⁹ They are also receiving an increase in enrollments along with favorable public attention.¹⁴⁰ The newfound interest in women's colleges is a response to studies that show "learned silence" and lower aspirations on the part of girls.¹⁴¹ Also contributing to this interest are the statistics on drinking, date rape, and violent crime on coeducational campuses.¹⁴²

Furthermore, there is proof that women's experiences at coeducational colleges are not equal to those of men.¹⁴³ Even though women graduate in the same numbers as men from higher educational institutions, women lack equal opportunities in the classroom.¹⁴⁴ Factors that make the university climate "chilly" and negative for women are male dominance of classroom discussions, devaluation of women's contributions, differential treatment by faculty, and stereotyped expectations.¹⁴⁵ Disparaging remarks and subtle behaviors put women at

¹³⁶ See Pyle, *supra* note 5, at 246-47; *Speeches*, *supra* note 125, at 261.

¹³⁷ See Pyle, *supra* note 5, at 247; *Speeches*, *supra* note 125, at 261.

¹³⁸ Cooper-Boggs, *supra* note 63, at 138-39; see also Cowan, *supra* note 5, at 141.

¹³⁹ See Sandra Reeves & Anne Marriott, *A Burst of Popularity*, U.S. NEWS & WORLD REP., Sept. 26, 1994, at 105.

¹⁴⁰ See *id.*; see also Cowan, *supra* note 5, at 141.

¹⁴¹ See Reeves & Marriott, *supra* note 139, at 106.

¹⁴² See *id.*

¹⁴³ See Epstein, *supra* note 121, at 107.

¹⁴⁴ See *Speeches*, *supra* note 125, at 258. But see Pyle, *supra* note 5, at 241-42 (stating sociologists have found no correlation between discriminatory teaching and classroom participation).

¹⁴⁵ See Feldblum et al., *supra* note 2, at 177-78 (citing ROBERTA M. HALL, ASSOCIATION OF AMERICAN COLLEGES, *THE CLASSROOM CLIMATE: A CHILLY ONE FOR WOMEN?* (1982)); see also Epstein, *supra* note 121, at 110-11. It is still reported "that faculty members consistently take the classroom contributions of male university students more seriously than those of women, ask them the more interesting questions and interrupt men less frequently when they speak." Schrag, *supra* note 118, at B6. Studies also show that "women students still seem to be more passive and less likely to challenge their male classmates, and more ready to accept men's assumptions and conclusions. The women, in short, outnumber men, but the men still dominate the classroom and the campus." *Id.* But see Pyle, *supra* note 5, at 241-42 (citing ROBERTA M. HALL, ASSOCIATION OF AMERICAN COLLEGES, *THE CLASSROOM CLIMATE: A CHILLY ONE FOR WOMEN?* (1982), along with other studies that showed the opposite).

a significant educational disadvantage.¹⁴⁶ The statistics that indicate equality has been achieved are misleading. "[T]hey don't reflect the way men and women treat each other on campus or regard themselves."¹⁴⁷ For these reasons, women's colleges are necessary for many of today's women.

Several factors make women's colleges different. Some are integral to any school, such as a small student body, a strong emphasis on academic content and achievement, high expectations, and a shared understanding of the school's mission.¹⁴⁸ Several other factors are uniquely present in women's colleges which encourage women to thrive.¹⁴⁹ Women control the curriculum, allowing women's values to be transmitted.¹⁵⁰ The classroom climate favors women's full participation.¹⁵¹ Current coeducational institutions favor a masculine mode of learning while women's colleges give everyone an opportunity to succeed.¹⁵² Women set policy for women and serve as mentors and role models.¹⁵³ Women's colleges may also positively influence their students' career choices¹⁵⁴ because women's colleges have an environment that produces female leaders.¹⁵⁵ Even in *United States v. Virginia*, advocates of both sides cited numerous studies that show the benefits of

¹⁴⁶ See Feldblum et al., *supra* note 2, at 178 (citing ROBERTA M. HALL, ASSOCIATION OF AMERICAN COLLEGES, *THE CLASSROOM CLIMATE: A CHILLY ONE FOR WOMEN?* (1982)).

¹⁴⁷ Schrag, *supra* note 118, at B6.

¹⁴⁸ See *Speeches*, *supra* note 125, at 256; see also Epstein, *supra* note 121, at 113-14; Pyle, *supra* note 5, at 242, 256. "Small, selective, coeducational institutions, where teaching is placed at a premium, are known to achieve the same or better for women as single-sex women's colleges. Recent research suggests that coeducational schools today are as likely to produce female scientists as are women's colleges." Epstein, *supra* note 121, at 113-14.

¹⁴⁹ See *Speeches*, *supra* note 125, at 256. But see Epstein, *supra* note 121, at 101 (arguing that women's colleges limit opportunities for their students); Pyle, *supra* note 5, at 236 (stating women's colleges are better for some women).

¹⁵⁰ See *Speeches*, *supra* note 125, at 256-57. But see Pyle, *supra* note 5, at 236, 244-46 (challenging the notion that there is a "women's way of reasoning"). "[S]o long as women's colleges compete with coeducational schools for the same students, it is not likely that they will develop radically distinctive courses of study." Pyle, *supra* note 5, at 248.

¹⁵¹ See *Speeches*, *supra* note 125, at 257. But see Pyle, *supra* note 5, at 236, 242, 250-51.

¹⁵² See *Speeches*, *supra* note 125, at 257. But see Epstein, *supra* note 121, at 110-11 (arguing that women's colleges merely remove women from the hostile coeducational environment); Pyle, *supra* note 5, at 236-37, 242-44 (challenging the argument that women have different educational needs).

¹⁵³ See *Speeches*, *supra* note 125, at 258. But see Pyle, *supra* note 5, at 248.

¹⁵⁴ See Cowan, *supra* note 5, at 141. But see Pyle, *supra* note 5, at 253-60.

¹⁵⁵ See Brief Amici Curiae of Wells College, Southern Virginia College and Saint Mary's College Supporting Affirmance at 2, *United States v. Virginia*, 116 S. Ct. 2264 (1996) (Nos. 94-1941, 94-2107) [hereinafter Brief of Wells]. But see Epstein, *supra* note 121, at 114; Pyle, *supra* note 5, at 251-53, 257-60.

single-sex education, especially for girls and women.¹⁵⁶ They argued that the district and appellate courts in the case found an important justification for single-gender education.¹⁵⁷ "[S]ingle-sex schools lead to higher achievement and self-esteem in women, encourage women to pursue traditionally male-dominated careers, and alleviate some of the disadvantages a number of women may suffer in a coeducational setting."¹⁵⁸

Others have noted that "[c]ompared with coeducational institutions, women's colleges reportedly have fostered greater verbal assertiveness, higher career aspirations, more intellectual self-esteem, expanded leadership opportunities, enhanced faculty-student contact, greater access to female role models, and more opportunities for women faculty or administrators."¹⁵⁹ Women at all-women colleges have superior academic records, are less likely to drop out of college, and have higher achievements after graduation.¹⁶⁰ "Many of our country's modern female role models attended women's colleges."¹⁶¹

By developing in a safe, comfortable learning environment, women learn "skills that will enable them to participate equally in mixed-sex activities."¹⁶² Women's colleges are effective in preparing women

¹⁵⁶ See Brief of Clark, *supra* note 53, at 9; Brief of Twenty-Six, *supra* note 31, at 2. "Single-gender education for women greatly increases the chances that a woman will succeed academically, pursue a career in a field traditionally associated with men, or assume a leadership role in society." Brief of Twenty-Six, *supra* note 31, at 2.

¹⁵⁷ See Brief of Wells, *supra* note 155, at 3; see also Brief of Twenty-Six, *supra* note 31, at 2-3.

¹⁵⁸ Brief of Mary Baldwin, *supra* note 5, at 8-9. For more on successes of women's colleges, see *id.* at 9-20. Some have challenged the correlation between women achievers and women's colleges. See, e.g., Epstein, *supra* note 121, at 112-14 (arguing that the data is unreliable); Pyle, *supra* note 5, at 253-60 (challenging the notion that women's colleges are "better at teaching or inspiring women"); Rhode, *supra* note 88, at 141 (stating that "the correlation of women achievers with women's schools took on an unwarranted causal significance"); *Speeches*, *supra* note 125, at 268-69 (stating that one "cannot draw a direct correlation between the success of the graduates of these women's colleges and the single-sexedness of the environment"). One commentator theorized that the correlation was instead based on the selectivity of the college: "the more selective the college, the more ambitious and distinguished its alumnae are likely to be." Pyle, *supra* note 5, at 259.

¹⁵⁹ Rhode, *supra* note 88, at 141; see also Land, *supra* note 5, at 313-15 (advantages), 315-16 (disadvantages). But see Pyle, *supra* note 5, at 248-60 (challenging the notion that women's colleges are better at teaching or inspiring women).

¹⁶⁰ See Browne, *supra* note 105, at 682; see also *Speeches*, *supra* note 125, at 256 (for statistics). But see Finley, *supra* note 1, at 1103-04 (detailing how separate may not mean equal when it comes to women and men); Pyle, *supra* note 5, at 253-60 (challenging the notion that women's colleges are better at teaching or inspiring women); Land, *supra* note 5, at 315-16 (noting similar benefits to males who attend single-sex schools).

¹⁶¹ Cooper-Boggs, *supra* note 63, at 138. But see Pyle, *supra* note 5, at 257-60.

¹⁶² Feldblum et al., *supra* note 2, at 174. But see Epstein, *supra* note 121, at 118; Pyle, *supra*

for their many roles in society.¹⁶³ By offering a challenging academic atmosphere, women's colleges aid women in realizing their potential and in building and becoming part of networks that will be useful in their lives.¹⁶⁴ Thus, the intellectual development of women is enhanced when they have the opportunity to study in a single-gender environment.¹⁶⁵

B. *Men Suing to Enter Women's Colleges*

Few cases of men wishing to enter women's colleges have reached the courts.¹⁶⁶ The following account is a hypothetical which poses some issues that could occur if such a lawsuit were to be brought.

A male student, upon hearing that women were to be admitted to the Citadel and VMI, decides that he would like to receive an education from one of the prestigious private women's colleges. He is interested in these colleges for a variety of reasons.

He thinks it is important to learn what it means to be marginalized. He is fascinated by women's history and women's studies, and believes that the women's colleges have stronger programs and better female professors.

He is also impressed by the school's success in getting students into graduate programs, and has noticed a high acceptance rate to the graduate program which he hopes to enter. He also feels that entering the women's college will be good preparation for his future career. The

note 5, at 236, 238–41 (citing the studies that show a loss of self-esteem in coeducational education but concluding that none of the "findings indicate that women's colleges provide a solution"); Land, *supra* note 5, at 316. One commentator noted that in one study women's colleges were not likely "to make a young woman more assertive, or more likely to compete with men in traditionally male pursuits." Pyle, *supra* note 5, at 252. The study showed "that women's colleges may attract a disproportionate number of women who do not desire to lead, but who seek shelter from competition." *Id.*

¹⁶³ See Brief of Twenty-Six, *supra* note 31, at 2. But see Epstein, *supra* note 121, at 118; Land, *supra* note 5, at 316. "It is not self-evident that men must be excluded from women's classes in order for women to learn how to be more assertive. It is at least as plausible to assume that if women must learn how to be more assertive, they might benefit from having some men to practice on." Pyle, *supra* note 5, at 241.

¹⁶⁴ See Brief of Twenty-Six, *supra* note 31, at 2.

¹⁶⁵ See *id.* at 3. But see Epstein, *supra* note 121, at 118; Pyle, *supra* note 5, at 252 ("if women are to learn how to lead men in an integrated workplace, they probably need some men to practice on in college"), 253–60 (challenging the notion that women's colleges are "better at teaching or inspiring women").

¹⁶⁶ See, e.g., *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Naranjo v. Alverno College*, 487 F. Supp. 635 (E.D. Wis. 1980); *Williams v. McNair*, 316 F. Supp. 134 (D. S.C. 1970); see also Pyle, *supra* note 5, at 268.

alumni network is quite strong, and he hopes he can break into the "old girl's network."

Even though his grades and SAT scores fall within the desired range, he is denied admission because he is male. He files a suit under the Equal Protection Clause of the Fourteenth Amendment claiming that he is being discriminated against because these schools will not consider his application. What is the result?

It would be difficult for the hypothetical male applicant to prove that women's colleges should be considered state actors covered by the Equal Protection Clause. This is because women's colleges are private, and the states in which they are located have no input into the policies of those colleges.¹⁶⁷

The Attorney General would be unlikely to bring suit to revoke the tax-exempt status of women's colleges on behalf of a male litigant. This is because women's colleges do not violate public policy, and courts have been unwilling to allow third parties to initiate such actions.¹⁶⁸ Congress has granted protection to single-sex colleges by exempting them from certain policies and they have made it explicit in the legislation.¹⁶⁹ Thus, statutory language would not aid a litigant in his suit against a women's college. Unless there was enough support to persuade Congress to change the law, a male litigant would be unlikely to succeed using federal statutory law in his suit.

The hypothetical male applicant would find that an Equal Protection claim would fail under current law.¹⁷⁰ Even if he could meet the

¹⁶⁷ See Cowan, *supra* note 5, at 168.

¹⁶⁸ See *supra* notes 81-83 and accompanying text (for discussion of tax-exempt status). For example, the *Smith College* court did not allow the local tax assessor to bring an action regarding tax-exempt status against Smith College. See *Trustees of Smith College v. Board of Assessors*, 434 N.E.2d 182, 184 (Mass. 1982).

¹⁶⁹ See Title IX of the Education Amendments of 1972, 20 U.S.C.A. § 1681(a) (West 1990).

¹⁷⁰ See Land, *supra* note 5, at 317-21 (discussing important state interest, substantially related means, and separate-but-equal). However, Pyle argues:

[P]rivate women's colleges like Wellesley, Smith, and Mount Holyoke must make two inconsistent arguments. First, they must claim to use distinctive educational means to achieve distinctive educational ends that could not be attained by admitting men. Second, they must argue that men do not need what they offer, do not want it, or can get it elsewhere in a coeducational setting. But just as a woman may want a VMI education, so a man may want what a predominately women's college has to offer. Not to take such men seriously is to perpetuate the stereotypic view that women's colleges are of no great value to anyone but women These generalizations about group desires may all be true, but it is constitutional error to impute such general traits to individual applicants for the purpose of precluding their right to apply.

Pyle, *supra* note 5, at 267-68.

first burden of proving that he is being discriminated against, women's colleges (as state actors) would have enough evidence to meet the "exceedingly persuasive justification" test.¹⁷¹ If the court did not believe that everything about women's colleges was positive, it would also have to consider how society discriminates against women.¹⁷² While the male litigant would consider *Hogan* to be persuasive in his case against women's colleges (there, a male litigant won the right to enter a nursing program in an all-female college), it could be easily distinguished.¹⁷³ The state's justification in *Hogan* failed because that college actually helped perpetuate the notion that only women should be nurses while women's colleges today prepare women for non-traditional careers.¹⁷⁴ Without precedent to support him, it is unlikely that the male litigant would be able to convince a court that women's colleges should be integrated.

C. All-Male Academies Are Not The Same As All-Women Colleges

The lower courts in *United States v. Virginia* subscribed to the view that all-male education is the same as all-female education.¹⁷⁵ Amicus educators agreed, declaring that Virginia had the right to consider the views of experts in determining which educational methodology was best for its schools.¹⁷⁶ Three women's colleges in an amicus brief also found single-sex education beneficial to both genders, providing diversity in higher education.¹⁷⁷ While emphasizing the value of all-female education, they also found all-male education to be beneficial in a materially similar manner.¹⁷⁸

¹⁷¹ See Land, *supra* note 5, at 317–22.

¹⁷² See generally MACKINNON, FEMINISM UNMODIFIED, *supra* note 122.

¹⁷³ See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 719–23 (1982).

¹⁷⁴ See *id.* at 727–31.

¹⁷⁵ See, e.g., *United States v. Virginia*, 766 F. Supp. 1407, 1411–12 (W.D. Va. 1991); see also Land, *supra* note 5, at 313–15.

¹⁷⁶ See Brief of Women's Schools, *supra* note 59, at 26.

¹⁷⁷ See Brief of Wells, *supra* note 155, at 2; see also Land, *supra* note 5, at 313–15. By supporting the right to a publicly funded all-male education, these colleges hoped to insure the security of private women's colleges from constitutional attack and limit the scope of the Court's opinion. See Brief of Wells, *supra* note 155, at 6. While private women's colleges are protected by Title IX and the U.S. Constitution, these amici urged that the Court "clear any remaining doubt," since these schools could not survive without public funds. See *id.* The colleges desired a show of constitutional support for single-gender higher education from the Court, in both the public and private contexts. See *id.*

¹⁷⁸ See Brief of Wells, *supra* note 155, at 1–2; see also Land, *supra* note 5, at 314–15.

The studies that the lower courts used to prove that single-sex education was beneficial to both sexes actually showed the benefits existed for women only.¹⁷⁹ The Supreme Court rejected the justification that all-male education is as equally valuable.¹⁸⁰ The all-male academies could not be furthering the educational goal of diversity because those public all-male academies had been that way since their inception and were the norm in an educational system that excluded females.¹⁸¹ They excluded women, not for educational benefits, but because it was not a woman's place at that time.¹⁸² By being excluded since the beginning, women could not be included in the program without changing it.¹⁸³ Since Virginia failed to create an all-women public program equaling VMI's program for men, its claim of educational diversity had to fail.¹⁸⁴

Women were long excluded from Virginia higher education until the advent of women's colleges, which were initially inferior to the men's colleges.¹⁸⁵ Virginia actually created those women's colleges for the benefit of men, to prevent women from applying to the prestigious "men's colleges."¹⁸⁶ When these women's colleges became coeducational, it was again for the benefit of men.¹⁸⁷

Until the Court's decision, VMI remained an all-male institution. It was only when VMI was threatened that Virginia created an inferior program for women, paralleling the advent of women's colleges in Virginia since the program was not comparable to VMI's program for men.¹⁸⁸ Virginia had a history of keeping the "powerful" institutions

¹⁷⁹ See Finley, *supra* note 1, at 1118; Laurie A. Keco, Note, *The Citadel: Last Male Bastion or New Training Ground?*, 46 CASE W. RES. L. REV. 479, 495 (1996).

¹⁸⁰ See *United States v. Virginia*, 116 S. Ct. 2264, 2279 (1996).

¹⁸¹ See *id.* at 2277.

¹⁸² See Mandelbaum, *supra* note 112, at 979-80.

¹⁸³ See *United States v. Virginia*, 116 S. Ct. at 2273.

¹⁸⁴ See *id.* at 2277. "Virginia has not shown that VMI was established, or has been maintained, with a view to diversifying, by its categorical exclusion of women, educational opportunities within the State." *Id.* "Virginia has elected to preserve exclusively for men the advantages and opportunities a VMI education affords." *Id.* at 2269.

¹⁸⁵ See *id.* at 2278. Justice Ginsburg summarized the history of women in higher education in Virginia as follows: "First, protection of women against higher education; next, schools for women far from equal in resources and stature to schools for men; finally, conversion of the separate schools to coeducation." *Id.*

¹⁸⁶ See *id.*

¹⁸⁷ See *id.*

¹⁸⁸ The Court viewed the women's leadership program "as a 'pale shadow' of VMI in terms of the range of curricular choices and faculty stature, funding, prestige, alumni support and influence." *United States v. Virginia*, 116 S. Ct. at 2285. VMI's prestige was a unique educational opportunity in Virginia, and the so-called parallel program of VWIL was no parallel "with a faculty

all-male,¹⁸⁹ a history that it was repeating with VMI and VWIL, and a pattern that the Court would not allow to continue.¹⁹⁰

The success of single-sex education may be specific to women "because it offers an environment free from female-specific forms of educational discrimination, such as silencing, discouragement, and male-peer harassment."¹⁹¹ Coeducational classrooms, in contrast, enhance male achievement.¹⁹² "[C]o-educational institutions reflect the values, perspectives and the practices of the dominant male culture," favoring men's participation and perpetuating male dominance.¹⁹³ Men do not get anything more from a single-sex school than from a coeducational institution.¹⁹⁴

Furthermore, single-sex male colleges result in sexism and derogatory attitudes towards women, preserving assumptions of male superiority.¹⁹⁵ The all-male military academies especially fostered male bonding through harassment and abuse, and stressed competition and aggression as modes of interaction.¹⁹⁶ A negative atmosphere was created, a "hypermasculine ethos,"¹⁹⁷ where women were regarded as "sex objects" instead of equals.¹⁹⁸

less impressively credentialed and less well paid, more limited course offerings, fewer opportunities for military training and for scientific specialization." *Id.* at 2287.

¹⁸⁹ *See id.*

¹⁹⁰ The Court decided that women should have the opportunity to partake in the prestige of VMI to become citizen-soldiers. *See id.* at 2282. The state's goal in producing leaders was "not substantially advanced by women's categorical exclusion, in total disregard of their individual merit" from VMI. *Id.*

¹⁹¹ Finley, *supra* note 1, at 1118; *see also Speeches, supra* note 125, at 255. The studies show a neutral or negative effect in all male education, and the research is ambiguous. *See* Finley, *supra* note 1, at 1119; *Speeches, supra* note 125, at 258. Those males who usually benefit "stand outside the white male culture." *See Speeches, supra* note 125, at 258. VMI and Citadel had the highest graduation rates for African-American males in comparison with the other schools in the state. *See id.* at 262.

¹⁹² *See* Finley, *supra* note 1, at 1119.

¹⁹³ *Speeches, supra* note 125, at 258.

¹⁹⁴ *See id.*

¹⁹⁵ *See* Finley, *supra* note 1, at 1119.

¹⁹⁶ *See Speeches, supra* note 125, at 259.

¹⁹⁷ *See id.* at 270.

¹⁹⁸ *See* Rhode, *supra* note 88, at 142.

IV. ANOTHER ARGUMENT FOR WOMEN'S COLLEGES—ANTI-SUBORDINATION

A. *The Theory*

The anti-subordination theory is an evolution of equal protection theory that is premised on the belief that "it is inappropriate for certain groups in society to have subordinated status because of their lack of power in society as a whole."¹⁹⁹ This approach seeks to eradicate power inconsistencies through laws and policies which compensate for those disparities.²⁰⁰

The Supreme Court has not accepted the anti-subordination theory as a constitutional standard, but the standard does demonstrate that women are harmed by male military academies and men are not harmed by women's colleges.²⁰¹ The framework focuses on discrimination and reminds us why the Fourteenth Amendment was adopted, to redress the subordination of groups of people.²⁰² Current interpreta-

¹⁹⁹ Ruth Colker, *Anti-Subordination Above All: Sex, Race and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986). Catharine A. MacKinnon defines subordination as being "in a position of inferiority or loss of power, or to be demeaned or denigrated." See CATHARINE A. MACKINNON, *Francis Biddle's Sister: Pornography, Civil Rights, and Speech*, in FEMINISM UNMODIFIED, *supra* note 122, at 163, 176. A related concept to anti-subordination theory is MacKinnon's dominance approach. See CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED, *supra* note 122, at 32, 40-45. She describes it as "an alternative approach, one that threads its way through existing law and expresses . . . the reason equality law exists in the first place." *Id.* at 40. "[I]t sees the inequalities of the social world from the standpoint of the subordination of women to men." *Id.* at 43. She describes the basis of the approach:

In this approach, an equality question is a question of the distribution of power. Gender is also a question of power, specifically of male supremacy and female subordination. The question of equality, from the standpoint of what it is going to take to get it, is at root a question of hierarchy, which—as power succeeds in constructing social perception and social reality—derivatively becomes a categorical distinction, a difference.

Id. at 40. She summarizes the approach:

[S]ee[ing] sex equality questions as matters of reasonable or unreasonable classification is part of the way male dominance is expressed in law. If you follow my shift in perspective from gender as difference to gender as dominance, gender changes from a distinction that is presumptively valid to a detriment that is presumptively suspect In the dominance approach, sex discrimination stops being a question of morality and starts being a question of politics.

Id. at 44. See generally Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY 635-58 (1983).

²⁰⁰ See Colker, *supra* note 199, at 1007.

²⁰¹ See Keco, *supra* note 179, at 499. See generally Colker, *supra* note 199, at 1054-58.

²⁰² See Keco, *supra* note 179, at 499.

tions of equal protection may not confer enough constitutional protection for women.²⁰³

The analysis asks how the perception of difference begins and continues, specifically seeking recognition of the methods by which society subordinates women.²⁰⁴ "An anti-subordination approach to equality . . . [includes] a contextual effort to analyze power dynamics, systems attitudes, and practices that operate explicitly or implicitly to maintain social, economic, and political dominance by one group over another."²⁰⁵ It examines "the cultural constructions and hierarchies of power that have caused differences to be interpreted as inherent and as better or worse on a hierarchy of social value and domination."²⁰⁶

This perspective examines "both facially differentiating and facially neutral policies" and deems them "invidious only if they perpetuate racial or sexual hierarchy."²⁰⁷ Race- or sex-specific policies are acceptable if they redress subordination,²⁰⁸ because it is difficult to achieve true equality through neutral remedies alone.²⁰⁹ There are situations where acting in an equal manner would result in perpetuating existing inequalities.²¹⁰

The anti-subordination perspective looks beyond individuals to society. It acknowledges that society creates subordination, and then it focuses on how subordination affects groups of people.²¹¹

There is an aversion towards discrimination, and the law that has developed to deal with it is best explained by the anti-subordination principle²¹² which is consistent with the intent of the Equal Protection Clause.²¹³ It is a more effective method than the traditional doctrine for viewing discrimination cases since it is a flexible doctrine that permits race- or sex-specific remedies in certain situations to redress prior discrimination.²¹⁴ The early litigation in women's rights was aimed at

²⁰³ See Higgins, *supra* note 124, at 1676.

²⁰⁴ See Sandra Levitsky, Note, *Footnote 55: Closing the "Bisexual Defense" Loophole in Title VII Sexual Harassment Cases*, 80 MINN. L. REV. 1013, 1038-39 (1996).

²⁰⁵ Finley, *supra* note 1, at 1122.

²⁰⁶ *Id.*

²⁰⁷ Colker, *supra* note 199, at 1007-08.

²⁰⁸ See *id.* at 1009-10.

²⁰⁹ See *id.* at 1013.

²¹⁰ See Feldblum et al., *supra* note 2, at 173; see also MACKINNON, *Francis Biddle's Sister: Pornography, Civil Rights, and Speech*, *supra* note 199, at 164-66.

²¹¹ See Colker, *supra* note 199, at 1008-09.

²¹² See *id.* at 1011.

²¹³ See *id.* at 1012.

²¹⁴ See *id.* at 1013.

prohibiting the state from maintaining gender roles, particularly those that subordinate women.²¹⁵ This strategy "overestimated the value of gender neutrality and underestimated the possibilities for affirmative state intervention on behalf of women . . . [since] the economic and political subordination of women continued."²¹⁶

1. The Supreme Court

The Court has shown tendencies towards the anti-subordination doctrine in recent affirmative action cases,²¹⁷ although it has also recognized necessary limitations to the doctrine.²¹⁸ The focus on stereotypes and their accuracy is an incomplete step towards an anti-subordination approach because it is a comparative equality framework.²¹⁹ Equality issues can only be considered when there are identically situated men.²²⁰ An anti-subordination analysis could play into the Supreme Court's scheme of scrutiny for gender-based classifications.²²¹ The analysis "offers a criteria for drawing the line" for legitimate classifications.²²² One criticism of the Court is that the discussion of stereotypes obscures the real issues of power, "masculinist supremacy," "devaluation of the feminine," and the different opportunities available to men and women.²²³

²¹⁵ See Higgins, *supra* note 124, at 1673.

²¹⁶ *Id.*; see also MACKINNON, *Difference and Dominance: On Sex Discrimination*, *supra* note 199, at 32-40 (discussing sex equality); 164-66 MACKINNON, *Francis Biddle's Sister: Pornography, Civil Rights, and Speech*, *supra* note 199, at 164-66 (discussing neutrality). Women "still have not got equal pay, or equal work, [and] far less equal pay for equal work[.]" MACKINNON, *Difference and Dominance: On Sex Discrimination*, *supra* note 199, at 36.

²¹⁷ See Colker, *supra* note 199, at 1014. At least one commentator has noted Justice Ginsburg's subordination focus. See Higgins, *supra* note 124, at 1678 n.102; see also Stuart Taylor, *The Death Knell for Single-Sex Public Education?*, CONN. L. TRIB., July 1, 1996, at 28.

²¹⁸ See Colker, *supra* note 199, at 1048.

²¹⁹ See Finley, *supra* note 1, at 1125.

²²⁰ See *id.*; see also MACKINNON, *Difference and Dominance: On Sex Discrimination*, *supra* note 199, at 36.

²²¹ See Higgins, *supra* note 124, at 1677-78. Higgins also discusses possible shortcomings of using an anti-subordination analysis. See *id.* at 1678.

²²² See *id.* at 1678.

²²³ See Finley, *supra* note 1, at 1123-24. One commentator has noted that "feminist theorists concerned with constitutional interpretation tend to criticize ways in which public and private power intersect to facilitate women's subordination." Higgins, *supra* note 124, at 1670. She has commented that "the Supreme Court has been extremely reluctant to view state responsibility broadly, resisting arguments based on state complicity in private subordination." *Id.* at 1674. Feminist Robin West has argued that "[A]t least a good deal of the time, in the name of guaranteeing constitutional protection of individual freedom, [the Constitution] also aggressively protects the very hierarchies of wealth, status, race, sexual preference, and gender that facilitate

2. The Inquiry

The anti-subordination framework, as proposed by Professor Ruth Colker, brings an anti-subordination focus to equal protection analysis. The framework modifies the bi-level inquiry that takes place in analyzing an equal protection case.²²⁴ First, the plaintiff's prima facie case is examined.²²⁵ The plaintiff would have to show a disparate impact on members of the plaintiff's group by the policy or action.²²⁶ Disparate impact is considered evidence of subordination.²²⁷

The inquiry then turns to the defendant's proffered justification for the challenged policy or action.²²⁸ Only a goal of anti-subordination could serve as justification.²²⁹ The state could not use after-the-fact justifications to support policies that perpetuated subordination; it could only have policies that aim to redress or eradicate subordination.²³⁰ The analysis acknowledges gender differences, looks at who is advantaged and disadvantaged by those differences, and decides if liability should be imposed for those policies which reinforce "gender differences and women's subordinate position in society."²³¹

Commentators have noted that the Supreme Court has left several issues open in equal protection analysis²³² and the anti-subordination

those practices of subordination." *Id.* at 1676 (citing ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* 165 (1994)).

²²⁴ See Colker, *supra* note 199, at 1014.

²²⁵ See *id.*

²²⁶ See *id.* at 1014–15.

²²⁷ See *id.* at 1033. "If litigants are to be successful in using law to remedy socially-imposed inequalities, the concept of disparate impact must be broadened to include a societal perspective." *Id.* at 1034.

²²⁸ See *id.*

²²⁹ See Colker, *supra* note 199, at 1015; see also Higgins, *supra* note 124, at 1677 (citing Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1307–08 (1991)).

²³⁰ See Colker, *supra* note 199, at 1015, 1060; see also Higgins, *supra* note 124, at 1677 (citing Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1307–08 (1991)). "Empirical evidence, no matter how strong, should not be allowed to further subordination." Colker, *supra* note 199, at 1043.

²³¹ See Levitsky, *supra* note 204, at 1038.

²³² See YODOF ET AL., *supra* note 69, at 761.

The Supreme Court opinions leave several central issues open . . . laws disadvantaging women or men are equally problematic, the extent to which women can be provided with special benefits, either to offset or compensate for past sex-discrimination remains unclear The cases also fail to clarify how ostensibly gender-neutral actions that markedly disadvantage one sex—either because they are based on a sex-specific trait such as childbearing or because they provide special treatment to a predominantly single-sex group—are to be decided.

Id.

theory would change this. The justification inquiry would focus on the principle of anti-subordination instead of the less reliable strict and intermediate scrutiny analyses.²³³

The essential inquiry would be how policies or actions connect to subordination.²³⁴ Such an inquiry would require courts to determine how the differentiation influences subordination,²³⁵ looking to the effect of the rule.²³⁶ "The trial court would make a specific finding as to whether the differentiation contributed to, or redressed, subordination."²³⁷

Under the anti-subordination framework, institutions could implement and defend policies and actions without relying on stereotypes, which would help eliminate subordination.²³⁸ Anti-subordination makes the entire equal protection analysis more meaningful.²³⁹

B. *Male Military Academies—Anti-subordination Analysis*

VMI would fail an anti-subordination inquiry because the policy had a disparate impact on women, and the policy had no anti-subordination goal.²⁴⁰ Men have an interest in perpetuating the status quo because preserving gender distinctions means preserving the rewards that men derive from them.²⁴¹ Since our society favors men over women, all-male institutions operate to preserve privilege.²⁴² VMI is a perfect example of such an attempt at preservation.²⁴³ The school is a

²³³ See Colker, *supra* note 199, at 1015.

²³⁴ See *id.*; see also Higgins, *supra* note 124, at 1677 (citing Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1318–19 (1991)).

²³⁵ See Colker, *supra* note 199, at 1033.

²³⁶ See *id.* at 1060.

²³⁷ *Id.*

²³⁸ See *id.* at 1059.

²³⁹ See *id.*

²⁴⁰ See Keco, *supra* note 179, at 498–99 (making this conclusion regarding the Citadel). It is also important to consider "how a single-sex institution connects with the society as a whole." Judith Shapiro, *School of One's Own, Why Women's Colleges Work*, PHOENIX GAZETTE, Nov. 28, 1994, at B5.

²⁴¹ See Levitsky, *supra* note 204, at 1040; see also Epstein, *supra* note 121, at 117–18.

²⁴² See Shapiro, *supra* note 240, at B5; see also Epstein, *supra* note 121, at 117–18. "Women's institutions challenge privilege and attempt to expand access to the good things in life." Shapiro, *supra* note 240, at B5.

²⁴³ See Keco, *supra* note 179, at 499 (discussing the Citadel); Shapiro, *supra* note 240, at B5.

It is not hard to imagine that an all-male military college was funded in the 1800s with the objective of keeping women in their proper place: out of college, and out of the military. Even though such a policy was a natural by-product of the culture and was not evidence of hatred towards women, it was nonetheless subordination.

Keco, *supra* note 179, at 499.

recognized power structure, which is why men wish to maintain its single gender character.²⁴⁴ The VMI case was about more than education.²⁴⁵ It was about wealth, power, and who will have those advantages in the future.²⁴⁶ VMI was "a haven for a dominating and anti-female understanding of men and masculinity."²⁴⁷ It also produced a negative culture of male-female relations.²⁴⁸ It was part of a system of male privilege because it taught men to hate the feminine, and that a feminine leader will always be less than a masculine leader.²⁴⁹ The policies of VMI have kept women out of positions of power by denying them access to the strong alumni network and have perpetuated the concept of women as being inferior to men.²⁵⁰

Viewing the VMI case through an anti-subordination lens, VMI clearly would not pass the analysis. First, the plaintiff would have to show that VMI's policy or action had a disparate impact on members of the plaintiff's sex.²⁵¹ This burden is easily met. The policy of excluding women from VMI had a disparate impact on women in both educational opportunities, because women who wished to experience a VMI-type of education could not, and in career opportunities, because women were denied access to the VMI alumni network for job opportunities.²⁵²

Second, in order to pass muster the defendants would have to show that the policy of excluding women has an anti-subordination goal.²⁵³ Since the conduct so clearly subordinates women, by denying

²⁴⁴ See *Keco*, *supra* note 179, at 499; see also Epstein, *supra* note 121, at 117-18.

²⁴⁵ See Finley, *supra* note 1, at 1120.

²⁴⁶ See *id.*

²⁴⁷ *Id.* at 1127.

²⁴⁸ See Shapiro, *supra* note 240, at B5. "Certain military academies may provide particularly florid examples, with exotic degradation ceremonies in which initiates are symbolically identified with women." *Id.* The link between misogyny and all-male groups is strong. See *id.* One commentator described such a negative culture at the all-male academies:

It is no accident that one form of verbal abuse heaped on cadets is to castigate them for being 'sissies,' 'pussies,' or 'fucking little girls.' Any perceived weakness along stereotyped lines of masculinity, including being 'too nice,' or caring, or showing emotion, are derided in feminine and homophobic terms. Further highlighting this anxious need to preserve a sharply hierarchical line between proper men and women, women who attempt to excel in traditionally male domains like VMI and The Citadel, are also frequently reviled in sexualized terms that call both their femininity and sexuality into question.

Finley, *supra* note 1, at 1116.

²⁴⁹ See Finley, *supra* note 1, at 1127.

²⁵⁰ See Feldblum et al., *supra* note 2, at 171; see also Epstein, *supra* note 121, at 117-18.

²⁵¹ See *supra* notes 225-27 and accompanying text.

²⁵² See generally *United States v. Virginia*, 116 S. Ct. 2264 (1996).

²⁵³ See *supra* notes 228-31 and accompanying text.

them educational and career opportunities, the state would have a hard time showing that its policy has an anti-subordination goal.²⁵⁴ The stereotypes of men and women perpetuated by VMI stigmatized members of the subordinate group (women) to the advantage of the dominant group (men).²⁵⁵ VMI's exclusion of women was for the benefit of men, a group that has not been subordinated in the past.²⁵⁶ Therefore, a publicly funded all-male VMI cannot be said to have an anti-subordination goal.²⁵⁷

The state's remedial plan of the VWIL could be considered to have an anti-subordination goal, but would fail since it actually subordinated the women's interests to the male interests of keeping VMI all-male.²⁵⁸ VMI also subordinated women because even though VWIL is more humane and possibly preferable for everyone, Virginia would have never pulled the public resources out of VMI to build up the VWIL program and open it up to men as well.²⁵⁹ If Virginia chose to emphasize the VWIL, this would call into question the traditionally masculine and make the traditionally feminine something valuable for both sexes.²⁶⁰ The state chose to preserve the masculine model for men only, perpetuating the perception that women, and anything "feminine," are not valuable.²⁶¹

C. All-Women Colleges—Anti-subordination Analysis

Women's colleges pass both traditional and anti-subordination inquiries because they do not have a disparate impact upon either men or women, and they have an anti-subordination goal.²⁶²

²⁵⁴ See generally *United States v. Virginia*, 116 S. Ct. 2264.

²⁵⁵ See Levitsky, *supra* note 204, at 1044.

²⁵⁶ See *id.*

²⁵⁷ See *supra* Part IV.A (The Theory).

²⁵⁸ See generally *United States v. Virginia*, 116 S. Ct. at 2272–73, 2282–87. For further discussion of VWIL, see *supra* notes 14, 53 and accompanying text.

²⁵⁹ See Finley, *supra* note 1, at 1105. Experts testified that VWIL was a better program for preparing leaders and that many men would prefer it over VMI. See *id.* at 1116. There was also no testimony that the adversative method was better for men than women. See *id.*; see also Keco, *supra* note 179, at 499 ("[T]he creation of [a women's leadership institute] perpetuates the subordination of women by relegating to them the stereotypical options that the legislature deems appropriate.").

²⁶⁰ See Finley, *supra* note 1, at 1105–06.

²⁶¹ See *id.* at 1106.

²⁶² See Land, *supra* note 5, at 317–21 (for traditional test); *infra* notes 267–281 and accompanying text (for anti-subordination analysis of women's colleges). But see Epstein, *supra* note 121, at 117–18 (stating women's colleges may fail an anti-subordination test).

Under the traditional doctrine, courts have accepted the argument that all-women colleges constitutionally serve a substantial state interest.²⁶³ "Those that seek to encourage and empower the traditionally subordinate, to give them a safe space to flourish, may actually foster the anti-subordination principle."²⁶⁴ Anti-subordination has been recognized as a state interest, since females should have the chance to study and develop leadership skills in a sexism-free environment.²⁶⁵ However, anti-subordination as a rationale under intermediate scrutiny was rejected in *Hogan* because of a lack of empirical evidence and compelling state policies.²⁶⁶

Under the anti-subordination analysis, there would have to be a showing of a disparate impact and subordination in order to declare all women's colleges admissions policies invalid.²⁶⁷ It is important to inquire about which gender benefits more from the current situation, and how these benefits might be spread out in a way that is better for society.²⁶⁸ "Women's colleges go to the heart of that issue because they exist to address inequality between the sexes and to serve the interests of women—not as places where women can think differently, or learn differently, or speak differently, but as the proverbial room of one's own."²⁶⁹ The important question would be: "Does the institution reinforce traditional views of women or does it provide women with the skills and tools to fight their subordination?"²⁷⁰

In applying the anti-subordination analysis to most of the women's colleges, which view themselves as training women to be leaders in our society or as creating a society in which their compensatory function is no longer necessary,²⁷¹ the first question is if a policy of single-sex education for women has a disparate impact on the plaintiff's class.²⁷² If the plaintiff is male, there would have to be a disparate impact on men for the suit to be successful.²⁷³ This result is not likely, since there are other universities where a man could get access to a similar educa-

²⁶³ See Colker, *supra* note 199, at 1054; see also Land, *supra* note 5, at 317–18.

²⁶⁴ Finley, *supra* note 1, at 1127.

²⁶⁵ See Colker, *supra* note 199, at 1055.

²⁶⁶ See *id.* at 1057.

²⁶⁷ See *id.* at 1065–66.

²⁶⁸ See Shapiro, *supra* note 240, at B5.

²⁶⁹ *Id.* But see Epstein, *supra* note 121, at 117–18 (stating that "[s]ex segregation in any social institution has overwhelmingly destructive consequences for women").

²⁷⁰ Colker, *supra* note 199, at 1066.

²⁷¹ See Rhode, *supra* note 88, at 144.

²⁷² See Colker, *supra* note 199, at 1014–15, 1033–34.

²⁷³ See *id.* at 1014–15.

tion. Furthermore, when males are excluded from women's colleges, this exclusion does not create the same stigma or economic and social disadvantages as excluding women from all-male schools.²⁷⁴

For example, our hypothetical male litigant is not likely to succeed under an anti-subordination theory. Even though he has a sincere interest in women's studies and history and would otherwise be an excellent candidate in terms of extracurricular (for example, if he played field hockey) and career interests, and even though he may not be able to find a comparable education because of his unique interests, he does not suffer from a social stigma by not being able to attend an all-female college. Furthermore, while he may be able to meet the first prong of the test, the disparate impact, he will not be able to prove subordination.²⁷⁵ Women's colleges are not a power structure that subordinates men, but a power structure that helps women achieve.²⁷⁶ Compare the hypothetical male applicant with a woman who wishes to enter an all-male academy.²⁷⁷ She has a sincere interest in studying subjects in which the academy specializes, she would be willing and able to participate in extracurricular activities, and attending the academy would suit her career goals. She is able to prove both disparate impact and subordination, since all-male academies are based on reserving the power in society for men.²⁷⁸

Even if some sort of disparate impact was proven, the women's colleges could justify it by showing that excluding men is for an anti-subordination purpose, which is clearly shown in the studies done on women's colleges.²⁷⁹ If the plaintiff was female, the disparate impact could only exist if the institution was harming women in some way.²⁸⁰ As the literature shows, women's colleges help women achieve equality and do not further societal constraints on them.²⁸¹

²⁷⁴ See Feldblum et al., *supra* note 2, at 216–17.

²⁷⁵ See *supra* notes 225–31 and accompanying text (for anti-subordination analysis).

²⁷⁶ See *supra* Part III.A.2.b–c (Justifications and Evidentiary Support for Women's Colleges).

²⁷⁷ See, e.g., *Faulkner v. Jones*, 10 F.3d 226 (4th Cir. 1993). See generally *United States v. Virginia*, 116 S. Ct. 2264 (1996).

²⁷⁸ See *Keco*, *supra* note 179, at 498–99. See generally *Cooper-Boggs*, *supra* note 63, at 131–36.

²⁷⁹ See *supra* Part III.A.2.c (Evidentiary Support for Women's Colleges).

²⁸⁰ See *supra* Part III.A.2.c (Evidentiary Support for Women's Colleges); cf. *Epstein*, *supra* note 121, at 117–18 (stating that all-women colleges have “destructive consequences for women” by reinforcing “disadvantages women face when they attempt to gain access to the opportunities and networks of association that are available to men”); *Rhode*, *supra* note 88, at 144 (“In all-female settings, it is more difficult to challenge the underlying cultural attitudes that perpetuate subordination; by definition, many of those most in need of such challenge are absent.”).

²⁸¹ See *Feldblum et al.*, *supra* note 2, at 218. “But as the remedial role of all-female schools becomes less necessary, their status becomes more problematic.” *Rhode*, *supra* note 88, at 144.

V. CONCLUSION

While equality is an aspiration in our society, the realities of society show that women have not reached that goal. True equality is not always possible when there has been a history of discrimination, since equal treatment may perpetuate the discrimination already in existence. While some see the integration of VMI as the beginning of the end for women's colleges, the truth is that excluding men from all-women colleges is quite different than keeping women out of all-men colleges. The *United States v. Virginia* opinion, while avoiding the issue of women's colleges, included language that recognized anti-subordination as a legitimate state interest. If the Supreme Court was to recognize anti-subordination as a legitimate goal, sex-differentiating policies would not be deemed unconstitutional merely because they were sex-differentiating. The conduct would need to have a subordinating disparate impact.²⁸² A "policy could be justified only if it was established to overcome subordination."²⁸³ While anti-subordination theory is not in the mainstream, and there is a lack of explicit reference to this approach in cases, it is merely an extension of the idea that sometimes asymmetry is necessary to effectuate equality—an idea which courts have accepted. The experience and outcomes between women's colleges and all-male academies are dramatically different, and despite comparisons between the two, women's colleges should not be threatened by the Supreme Court's decision in VMI.

²⁸² See Colker, *supra* note 199, at 1061.

²⁸³ *Id.*

